We can submit no better statement of the evidence than is presented in the dissenting opinion of Judge Pope of the Circuit Court.

The majority opinion recites:

> " . . . . he (the insured) put the gun to his forehead in the presence of the plaintiff, and the gun was fired, resulting in the death of the decedent."
>
> (Opinion of the Court of Appeals, pp. 1 & 2).

Judge Pope characterizes this statement as "not only inaccurate, but very incomplete." (Opinion, p. 6). He then summarizes the evidence as follows:

"At the time of his death Trivette was 45 years of age. He had two children by a former marriage, and appellant and he were married in 1945. They had four children born of their marriage, the eldest of whom was 10 and the youngest, 5. These four children and the youngest of the children by the former marriage lived with him and the appellant. He was engaged in the coal mining business and as an adjunct to it operated a garage. The business was prosperous; he drew a salary as executive vice-president and general manager of $700 per month. His wife and oldest son each drew a salary or dividend also. He had no business problems; he was attentive to and affectionate with his wife and children and within a week preceding his death he had made plans to install a children's playground for his own and the community children on an adjacent lot. He had no health problems. In short, the evidence negatives any possible motive or reason for suicide.

"The evidence does disclose that Trivette was given to occasional fits of anger in which his actions were so fantastic and bizarre as to indicate a serious mental instability. During these explosive tantrums Trivette

would engage in violent actions usually accompanied by shooting of the pistol. Some 10 years previous to his death when the family lived in Indiana, Trivette became 'quite angry' when he had had trouble with some hired hands and 'he got the gun out,' 'stomped out the house,' fired his pistol and was found outside sitting on the sidewalk. Some seven years later he became angry because of an interruption of his Saturday night dinner plans and 'broke up all the things in the living room'; 'just started swiping everything off the tables and wrecking them off, and there was glass all over the living room and dining room.' He got his gun out and 'slung it around just like he was swinging his hands around before and ordered his wife to clean up the mess.' Approximately two years prior to his death in another similar tantrum he got his pistol and shot out the light in the center of the ceiling of his bedroom, the same room in which he was finally shot. The testimony indicated that after such demonstrations of anger he would quickly recover and often when they occurred he had been drinking whiskey.

"On the occasion when he was shot he went into a similar tantrum. He had eaten dinner with his family and the steaks served had been selected by his brother-in-law with whom Trivette was out of sorts on account of the former's failure to repay a loan owing to Trivette; the steaks proved to be tough and Trivette refused to finish his dinner and became sullen. He continued sullen and incommunicative and then went to the garage to get some money and after about twenty minutes he returned to the house still in an ugly mood. He went into his bedroom and motioned to his wife to come in. His wife had bought him a shirt and a pair of slacks and he was about to pack a bag in order to spend a night at a motel to avoid night calls from the garage. At the sight of the shirt and slacks he became violent;

he found the sleeves of the shirt about a quarter of an inch too long and tore it and the slacks saying: 'Don't buy me any more clothes.' He threw the torn slacks and shirt across the bed toward his wife; he was then standing in a narrow space between the bed and the wall with his right side next to the wall. At this point his wife started to get up to calm him when suddenly he pulled a gun from under his coat and belt with his right hand and with a single sudden motion 'like a flash' fired the pistol upward. The pistol was a 44 Special Smith & Wesson revolver which measured 12 and ½ inches from muzzle to butt with a weight without ammunition of 38 ounces. It was loaded with 5 cartridges each 1 and ½ inches in length.

"It is permissible inference from the record that when Trivette 'like a flash' and in a fit of blind anger suddenly jerked this extraordinarily heavy gun from his belt, he intended to do precisely what he had done before, shoot into the ceiling, and that in attempting to do so all in one movement, his elbow struck the wall by which he was standing and the shot was deflected to hit the side of his head and ranged upwards to the top of his head.

"Mrs. Trivette testified that he was standing close to the wall; as he pulled out his gun and raised it, he pulled his arm back; and although she did not actually see his arm strike the wall, 'I thought that he had because he was standing so close to the wall; I stood in the same position he did and I could not see how he could get the gun to his head without striking the wall.'

"I think that a jury would properly infer that the manifest purpose of Trivette was not to harm himself but to frighten his wife just as he had done on the prior similar occasions. The inferences are all against any purpose or self destruction and an inference of accidental shooting is plainly suggested."

We can only add these circumstances negating any intent of suicide and adding strength to the inference of accident.

Over $900 in currency and five extra cartridges for the pistol were found in his pocket after his death. He had packed toilet articles in a case preparatory to spending the night at a motel.

He left no will,—no suicide note. He had made no threats to kill himself.

There was powder burn on his right temple forming a circle around the hole made at the point of entry of the bullet about ¾ths or ⅞ths of an inch in diameter showing conclusively that the muzzle of the gun was not in contact with the head when fired.

There was a coroner's inquest held and a jury composed of qualified citizens residing in the community where the decedent lived returned a verdict of accidental death by gunshot wound.

A chronological statement of these and other relevant facts properly documented with record references was included in the brief filed in the Court of Appeals, and is hereto attached marked "Appendix—Statement of Facts."

None of these or the other circumstances mentioned by Judge Pope indicate any intention or predetermined purpose of the deceased to take his own life. Each and all strongly negate any theory of intentional suicide and support the theory of accident.

A literal definition of suicide is *self-killing*. However, in all cases involving suicide clauses in insurance policies the element of intention is incorporated into the definition of the term.

In this case it must be conceded that the decedent killed himself. However, there is no evidence that he intended to do so. There is positive and uncontradicted evidence that he did not intend to take his own life.

At the conclusion of all the plaintiff's evidence outlined above, the District Court sustained the defendant's motion for a directed verdict, and pursuant thereto the jury returned a verdict for the defendant. Motion and grounds for new trial were overruled, and an order entered dismissing the complaint.

From that an appeal was prosecuted to the Court of Appeals, which sustained the District Court by a divided opinion, above referred to.

Petition for rehearing was overruled.

This petition is directed to those rulings of the Circuit Court.

VI. BASIS OF FEDERAL JURISDICTION

The basis of Federal jurisdiction in the District Court was diversity of citizenship.

VII. BASIS AND ARGUMENT FOR WRIT OF CERTIORARI

A. Basis

The basis upon which this writ is sought is:

The Circuit Court of Appeals (1) has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal, and in conflict with the decided weight of authority from other Circuits, s.e., Is the question of submitting an issue of fact to a jury one of substantive law controlled by the Erie case, or one of procedure, not within the rule of the Erie case? (2) has decided an important question of federal law which has not been, but should be, specifically and definitely settled by this court, s.e.: same question; (3) has decided a federal question in a way in conflict with applicable

decisions of this court, s. e.: same question; (4) has sanctioned a departure from the accepted and usual course of judicial proceedings, and from decisions of both State and Federal Courts as to call for an exercise of this Court's power of supervision. (See S. Ct. Rule 19-1-(b).)

B. Argument

1. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

Fifth Circuit: Marie E. Pogue, et al. vs. The Great Atlantic & Pacific Tea Co., 242 F. (2) 575. This was a diversity case brought in Florida to recover for injuries to a cutsomer occasioned by slipping on lettuce on the floor of the store. The A. & P. contended it was entitled to summary judgment under Florida law. The Court said:

> "We do not think we should seek to discover how that apparently unique doctrine of Florida law should be applied to the evidence in this case, for we consider it purely procedural and without application to a case tried in the Federal Court. The extent to which state law controls was well stated by Professor Moore in 5 Moore's Federal Practice, 2d ed., Para. 38.10, p. 102:
>
> > " 'The elements of plaintiff's prima facie case, or of defendant's defense, must be determined by applicable local law in a case involving only nonfederal matters. But the sufficiency of certain evidence to raise a question of fact for the jury, or for the court where trial is without jury, should not be controlled by state law.'
>
> "The kind of jury trial to which the parties are entitled in Federal Courts under Rules 38 and 39 of the Federal Rules of Civil Procedure, 28

U.S.C.A., is that preserved by the Seventh Amendment to the Constitution, *to which the doctrine of Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188,* is of course subservient." (242 F. (2) 582).

See also from 5th Circuit:

Reuter vs. Eastern Air Lines, 226 F. (2) 443, 445.

Reynolds vs. Pegler, 223 F. (2) 429, 433, 434.

Revlon, Inc. vs. Buchanan, 271 F. (2) 795.

Pass vs. Firestone Tire & Rubber Co., 242 F. (2) 914.

Wright vs. Paramount Richards Theatres, 198 F. (2) 303, 305.

In that case, the Court said:

"We regret that we cannot agree with the painstaking opinion of the learned District Judge. It is true that under the landmark decision in Erie Railroad Co. vs. Tompkins, supra, this Court, as well as the District Court, sits in this case just as another tribunal for interpreting and applying the substantive law of the State of Louisiana. It is true, also, as said in Guaranty Trust Company vs. York, 326 U. S. 99, 109, 65 S. Ct. 1464, 1470, 89 L. Ed. 2079, that,

" 'In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlines Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.'

"However, in federal courts the principle just adverted to must give way to the overriding consideration that the federal court is bound by the Seventh Amendment to the Constitution of the United States. See Gillen v. Phoenix Indemnity Co., 5 Cir., 198 F. 2d 147 . . . .

"We think that the learned District Judge in entering judgment notwithstanding the verdict has been led into error through considering the findings of Louisiana courts on facts as distinguished from their decisions on law to be binding upon the jury and the court."

Ninth Circuit: Allen vs. Matson Navigation Co., 255 F. (2) 273. This was a diversity case in which the plaintiff sought damages for injury caused by slipping on a stairway.

That Court said: "The sufficiency of certain evidence to raise a question for the jury should not be controlled by State Law (citing) 5 Moore's Federal Practice, 2nd Ed., Par. 38.10, p. 102."

See also State of Washington vs. United States, 214 F. (2) 33; Smith vs. Buck, 245 F. (2) 348; Allen vs. Matson Navigation Co., 255 F. (2) 273.

Tenth Circuit: Diederich vs. American News Co., 128 F. (2) 144.

It was there held that an Oklahoma constitutional provision requiring an issue of contributory negligence be submitted to a jury was not controlling in Federal Courts.

See also Basham vs. City Bus Co., 219 F. (2) 547; Miller vs. Irby, 227 F. (2) 942.

Third Circuit: Goodwin vs. Townsend, 197 F. (2) 970.

It was there held that an Ontario statute of limitations was a procedural question and did not bar an action in the Federal Court.

The distinction between "substantive" and "procedural" law is clearly drawn in this case.

Fourth Circuit: McSweeney vs. Prudential Ins. Co., 128 F. (2) 660. In this case the Court said "Decisions of the South Carolina Court .... are not in point. In the first place, the question as to whether a case should be submitted to the jury or verdict directed is a matter of Federal Practice, *as to which local* decisions are not controlling .... " (Emphasis ours.)

See also Gorham vs. Mutual Benefit H. & A., 114 F. (2) 97 and cases cited; Pierce vs. Ford Motor Co., 190 F. (2) 910; Davis Frozen Foods vs. Norfolk Southern Railway Co., 204 F. (2) 839.

Sixth Circuit: Even in the Sixth Circuit to which this writ is sought, that court apparently recognized the principle that submitting an issue to a jury or directing a verdict was "Procedural."

Order of United Commercial Travelers vs. Duncan, 221 F. (2) 703. There the Court said, "The court did not err in submitting this question to the jury. It was a *Procedural question* governed by the law of the forum. Restatement, Conflict of Laws, Sec. 585. The law of the forum determines whether an issue of fact shall be tried by the court or by a jury—Restatement, Conflict of Laws, Sec. 594." (Emphasis ours.) (221 F. (2) 706).

Second Circuit: In Presser Royalty Co. vs. Chase Manhattan Bank, 272 F. (2) 838, that Court indicated but did not decide that "the question whether evidence was sufficient to take the case to the jury is *probably* to be determined by New York law." (Emphasis ours.) The use of the word "probably" emphasizes the existing conflict. See Reynolds v. Pegler, 223 F. (2) 433, where that Court described Moore's Text as the "better view."

The Court of Appeals in this (Trivette) case affirmed the ruling of the District Court in directing a verdict and denying submission of the vital issue of fact—s.e.: intentional suicide, to the jury. The basis of the ruling in both courts was the decisions of the Kentucky Court of Appeals in Prudential Insurance Co. vs. Tuggle's Admr., 254 Ky. 814, 72 S. W. (2) 440 and Prudential Insurance Co. vs. Redwine, (Ky.), 332 S. W. (2) 643, in which the Kentucky Court held that under the facts of those cases the question of suicide or not was for the Court and not the jury.

We will not here burden the Court with an analysis of those cases, to show the vast difference between the facts presented in each of them and the facts shown here, nor to point to the many decisions of the Kentucky Court of Appeals where it was held that the issue of suicide was for a jury. We will submit such an analysis in the Appendix.

Our point is that regardless of which line of Kentucky cases might apply to the facts of this case, the Federal Court is not bound by the state decisions, since it is purely a procedural question and under Federal law the issue is one to be submitted to a jury, the Erie case notwithstanding!

This ruling is, therefore, in conflict with and contrary to the rulings of other Circuit Courts and contrary to the overwhelming majority of the other Circuit Courts.

That such conflict does exist is recognized by this Court in Dick vs. New York Life Insurance Co., 359 U. S. 437, 79 S. Ct. R. 921, 926 as noted in the following topic.

2 and 3. THE DECISION OF THE CIRCUIT COURT INVOLVES A FEDERAL QUESTION NOT DEFINITELY SETTLED, AND IS IN CONFLICT WITH THE DECISIONS OF THIS COURT

It may be said that the question involved has not been specifically decided by this Court. However, we consider it has been decided in principle and that the petitioned decision is in conflict therewith.

Hence, we shall discuss these topics together.

The petitioned decision conflicts with two late decisions of this Court, at least in principle.

We refer to (1) Byrd vs. Blue Ridge Rural Electric Co., 356 U. S. 525, 78 S. Ct. 893, and

Magenau vs. Aetna Freight Lines, 360 U. S. 273, 79 S. Ct. 1184.

The Byrd case was based on diversity of citizenship. The plaintiff sought damages for injury received while engaged as a lineman on an electric power line. The defendant sought immunity from liability under the South Carolina Workmen's Compensation Act which, it claimed, afforded the plaintiff his only remedy and was a bar to the common law action. The plaintiff was not employed directly by the defendant, but was working for a contractor which the defendant had engaged to do the particular job on which the plaintiff was injured. The South Carolina Statute provided compensation for injuries to any person engaged in the work of an owner, under a sub-contractor "which is a part of his trade, business, or occupation," on the same basis as one immediately employed by the owner. The questions presented were (1) whether the employer-employee relation existed under the South Carolina Statute, and (2) whether under conflicting evidence this was an issue to be tried by the Court or by a jury. South Carolina courts had held this to be

the function of the Court, and not a jury. Hence, it was argued that the Federal Court was bound by the State Court under the Erie case.

This Court held that the question was triable by a jury under the mandate of the Seventh Amendment.

We quote from the majority opinion:

> "But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. Jacob v. City of New York, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166. The policy of uniform enforcement of state —created * * * * 538 * * * * rights and obligations see, e. g., Guaranty Trust Co. of New York v. York, supra, cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. Herron v. Southern Pacific Co., 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court. . . . We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome."
>
> (79 S. Ct. R., pp. 901-902.)

So we see that in this case it was held that Federal rule of trial by jury was paramount to a State

Statute specifically delegating this function to the Court.

In the Magenau case, also based on diversity of citizenship, the plaintiff's decedent sought damages for death caused by defendants' negligence. Decedent had been employed en-route by the driver of a defendants trailer-truck, operated by an independent contractor under an I.C.C. Certificate. Under Pennsylvania law the defendant was liable for the negligence of the contractor. The question arose as to the sufficiency of the District Court's instruction.

The case was argued before the decision in the Byrd case was handed down.

This Court followed the Byrd case and held the entire question of employer-employee relationship was for the jury. The Court said:

> "Be this as it may, however, not only the question of the relationship of the decedent to respondent should have been submitted to the jury but, in order to meet Sec. 104's definition, it should likewise have passed upon whether the employment, if any, was 'casual' and not 'in the regular course' of respondent's business." (79 S. Ct. R. 1187).

It is noted that the Pennsylvania Courts had held that such issues of employer-employee relationship was triable to the Court and not to a jury.

Again we find the federal rule of trial by jury prevailing against a contrary rule of practice in the State Court.

Each of these cases cite and follow Herron vs. Southern Pacific R. Co., 283 U. S. 91, 51 S. Ct. 383.

We submit that the Byrd case followed by the Magenau case clearly and definitely establishes the principle that the question of trial of a disputed issue of fact by Court or jury must be governed by Federal law and, therefore, the federal rule of trial by jury under

mandate of the Seventh Amendment must prevail notwithstanding either State Statute or decision to the contrary,—also that such is a procedural question beyond the reach or influence of the Erie decision.

4. THE CIRCUIT COURT HAS SANCTIONED A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND FROM DECISIONS OF BOTH STATE AND FEDERAL COURTS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

KENTUCKY DECISIONS: The Tuggle case and the Redwine case, supra, are each clearly distinguishable from the case here. In each of those cases it appeared as an undisputed fact that death was the result of *intentional* suicide.

See Appendix IV, Differentiation Between the Case at Bar and the (Ky.) Tuggle & Redwine Cases.

In a long line of cases the Court of Appeals of Kentucky both before and after the Tuggle case has consistently adhered to the doctrine that where the facts and circumstances are such that reasonable minds might differ as to whether death resulted from intentional suicide or accident, the issue is for a jury.

Intersouthern Life Ins. Co. vs. Boyd, (Ky.), 124 S. W. 333.

Aetna Life Ins. Co. vs. Kaiser, 24 Ky. L. R. 2454, 74 S. W. 203.

Mutual Benefit Life Ins. Co. vs. Davies, 87 Ky. 541, 9 S. W. 812.

Manhattan Life Ins. Co. vs. Beard, 112 Ky. 455, 66 S. W. 35.

Aetna Life Ins. Co. vs. Milward, 118 Ky. 716, 82 S. W. 364.

In this case the highly regarded Judge Edward O'Rear observed "The love of life is instinctive; self-preservation is its first, as it is its strongest, law."

Metropolitan Life Ins. Co. vs. Maddox, (Ky.), 127 S. W. 503.

Vicars vs. Aetna Life Ins. Co., 158 Ky. 1, 164 S. W. 106.

Columbian Nat. Life Ins. Co. vs. Wood, 193 Ky. 395, 236 S. W. 562.

National Life Ins. Co. vs. Watson, 194 Ky. 355, 239 S. W. 35.

Penn. Mutual Life Ins. Co. vs. Roberts, 207 Ky. 524, 269 S. W. 736.

United Benefit Life Ins. Co. vs. Schott, 296 Ky. 789, 177 S. W. (2) 581.

Ky. Home Mut. Life Ins. Co. vs. Watts, 298 Ky. 471, 183 S. W. (2) 499; 304 Ky. 308, 200 S. W. (2) 732.

In the first Watts case the Court said "But where the evidence is such that the jury may or may not infer suicide, it is the duty of the Court to submit the issue to the jury for its finding."

These Schott and Watts cases came after the Tuggle case.

Hence, even if the Kentucky decisions were controlling on this procedural question, the Circuit Court, as well as the District Court, has departed from the well-established rules announced by that Court.

FEDERAL DECISIONS:

Dortch vs. N. Y. Life Ins. Co. (8th Circuit), 268 F. (2) 149.

This 1959 decision presents a set of circumstances strikingly similar in all respects to the facts shown in this Trivette case. The 8th Circuit held the question of intentional suicide or accidental death was for the jury. The Court quoted with approval the following language from an Arkansas opinion:

> "If the facts are such that reasonable intelligence may draw therefrom different conclusions on the question in dispute, then they were properly submitted to the jury for determination. Judges should not, under that state of case, substitute their judgment for that of a jury." (268 F. (2) 154).

It is noted that the Circuit Court (Eighth Circuit) took the minority view that the question of trial by judge or jury was a question of substantive law controlled by State Court decisions. (268 F. (2) 151), thus emphasizing the conflict discussed above.

After reciting the facts in some detail, from which it appears that the decedent, (Bredlow), died from a gunshot wound, triggered by his own hand while alone in his office, the Court said:

> "We do not think here that the evidence pointing to suicide by Bredlow is so conclusive that fair minded men could reach no other conclusion. It is not for us to say whether Bredlow came to his death by his own wilful act. The evidence is entirely circumstantial. That introduced by the plaintiffs gives the picture of a normal, happy and contented person, making plans for future pleasure and for work, who had no reason whatsoever to desire to terminate his life, and who was killed by a gun which was dirty, had discharged accidentally before and could have again. The conclusion

to be drawn therefrom is that Bredlow did not commit suicide. On the other hand, there is presented the picture of a man who had, at least partially, retired, had time on his hands without the capacity to utilize it in an enjoyable way, who was nervous, dissatisfied and unhappy. From such evidence could be drawn the conclusion that he took his own life. Which ultimate fact is correct? It is not for the judges of the court to say, even if they were of the opinion that 'the theory of death by suicide finds more rational support in the facts established by direct proof than the theory of death by accident—that there is greater probability from the evidence that death resulted from a suicidal act than an accident * * * * and we make no such indication here. What we think happened that Sunday morning in Bredlow's office is utterly and absolutely of no consequence in this case unless the circumstances introduced by the evidence are entirely inconsistent with any reasonable hypothesis excepting suicide and force the conclusion that reasonable men could come to but that one determination. Such is not the situation in this case."

(268 F. (2) 154, 155).

In Dick vs. New York Life Insurance Co., 359 U. S. 437, 79 S. Ct. R. 921, we have another case where the facts are strikingly similar to those in the case here. The opinion recites:

"He was relatively healthy, financially secure, happily married, well liked, and apparently emotionally stable. He left nothing behind to indicate that he had committed suicide, and nothing in his conduct before death that indicated an intention to destroy himself. The timing of the death, while in the midst of normal chores and immediately preceding a planned appointment with neighbors militates against such a conclusion."

(79 S. Ct. R. 927).

The District Court submitted the case to a jury which found for the plaintiff in the amount sued for. Upon appeal to the Eighth Circuit Court of Appeals, (New York Life Insurance Company vs. Dick, 252 Fed. 2d 43), the judgment was reversed with directions to dismiss the complaint on the grounds that the theory of accidental shooting "stretches credulity beyond the breaking point," and that the facts and circumstances proven in the case could not "be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was an accident was not a question of fact for the jury."

The Supreme Court reversed the decision of the Circuit Court of Appeals and sustained the judgment. The Court held that under the law of North Dakota, there was a presumption against suicide. The Court said: "Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide."

The opinion further points out that, as in Kentucky, under the North Dakota law, the presumption against suicide is merely a rebuttable presumption, and an examination of the North Dakota cases cited in the opinion merely shows that the law of North Dakota is substantially identical with that of Kentucky on this question.

The Court said:

"Under all the circumstances, we believe that he, (the District Judge), was correct, and that reasonable men could conclude that the respondent, (the insurer), failed to satisfy its burden of showing that death resulted from suicide."

The only difference that we can perceive in the facts and circumstances in the Dick case and the one

here, is that there was no eye witness to the actual shooting. However, there was no indication whatever that anyone except the insured pulled the trigger. The proof showed that the first shot, which landed in his chest, was not a fatal wound, and that the second shot, which blew off his head, was fatal. The only evidence of any nature contradicting the theory of suicide was the purely circumstantial evidence of lack of motive and his domestic situation referred to in the quotation from the Court's opinion, appearing above.

In this case, we have the same circumstances, i.e.: no motive, good health, financially secure, happily married. In this Trivette case, we find the fatal shooting occurred in the midst of preparations to spend the night away from home to avoid the Saturday night calls from the garage. In the Dick case, the insured was in the midst of his usual chores at the farm. Here, we have no suicide note, no will, as in the Dick case.

It is to be noted that this Court declined to decide the question of "whether it is proper to apply a state or federal test of sufficiency of evidence to support a jury verdict." The decision recites "On this question the lower courts are not in agreement."

This question was not properly before this Court in the Dick case, hence the opinion recites "A decision as to which standard should be applied can well be left to another case where the question is briefed and argued." (79 S. Ct. R. 926).

Hence, we find substantial departure from decisions in so-called suicide cases from both Kentucky and Federal Decisions.

However that may be, we think the question discussed under Topic 1—s.e., conflict in the Circuit Courts, demands certiorari.

Mr. Justice Whittaker, in his separate opinion in the Byrd case, (supra), said that the terms "substan-

tive" and "procedural" were not "talismanic," (78 S. Ct. R. 907). We agree that mere terminology should not control. However, to our mind there is a sharp clear distinction between "substantive law" and "procedural law," which we have not seen expressed in any of the decisions. Substantive law relates to the basic rights and obligations of the litigant. It is the "what" in the question, s.e.: *What* are those rights and obligations? Procedural law is the "*how*" in the question, s. e.: *How* are those rights and obligations to be determined? If the rights and obligations arise from statute or the decisions of a State Court it is substantive law and the Erie doctrine applies. If it is purely a question of *how* or by what procedure those rights and obligations are to be determined, then it is a procedural question and Erie does not apply.

Under Federal practice the trial Judge is permitted to comment on evidence. In most state courts this is not permitted, and if done, is reversible error. This is a clear example of the distinction. It is not a question of *what* are the rights and obligations of litigants, but *how* those rights and obligations are to be determined.

Likewise, the question of whether an issue of fact is triable to the Court or jury is a question of *how* the rights and obligations of litigants is determined and hence is a procedural question beyond the scope or influence of the Erie case.

VIII. CONCLUSION

For the reasons stated it is our contention that this petition for writ of certiorari should be granted.

Respectfully submitted,

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